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TRIAL CHAMBER IV

Before:

**Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi**

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

**Defence Application for Leave to Reply to Prosecution's Response to the
Defence's Oral Application of 19 April 2011**

**Sources: Defence Team of Abdallah Banda Abakaer Nourain
 Defence Team of Saleh Mohammed Jerbo Jamus**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. In this application the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully request the Trial Chamber to grant leave to reply to the Prosecution's Response to the Defence's Oral Application of 19 April 2011¹ ("Response"), filed 4 May 2011. As set out below, there is good cause to reply to the Response as it raises new legal matters that were not addressed by the Defence in its oral application of 19 April 2011² ("Oral Application") and incompletely considers the important issue of witness proofing. Granting leave to reply in these circumstances would serve the interests of justice.

II. Background

2. At the Status Conference held on 19 April 2011, the Defence expressed the concern that the re-interviews of six witnesses planned by the Prosecution may raise difficulties similar to those underlying the prohibition of witness proofing³ at the International Criminal Court.⁴ Therefore, the Defence requested the Trial Chamber to decide whether the Prosecution may conduct such re-interviews and if so, what measures may be put in place by the Trial Chamber to guard against such difficulties arising.⁵ During the Status Conference, the Prosecution had the opportunity to respond to the Oral Application of the Defence.⁶ On 21 April 2011, the Trial Chamber ordered the Prosecution to file a response to the Oral Application, including its observations on potential safeguards.⁷

¹ ICC-02/05-03/09-140.

² ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 12, line 1 to page 17, line 2.

³ See *Prosecutor v. Lubanga*, TC I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679.

⁴ In particular, Defence Counsel noted the principle set out in Trial Chamber I's 23 May 2008 Decision in the Lubanga case (ICC-01/04-01/06-1351) that discrepancies in a witness's prior statements "should be ventilated in court" as the "Chamber is more likely to identify the truth if the witness explains any reservations about the[ir] written account during their oral testimony [...]." ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 12, lines 18 to page 13, line 13.

⁵ ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 14, lines 5-9.

⁶ ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 14, line 17 to page 15, line 7.

⁷ ICC-02/05-03/09-137.

3. On 4 May 2011, the Prosecution submitted its written Response, in which the Prosecution state that re-interviews serve the purpose of asking new questions or clarifying matters and gaining more precision.⁸ The Prosecution equate proofing to “a rehearsal of the witness’s imminent upcoming testimony.”⁹ It is the Prosecution’s submission that its proposed re-interviews are part of its ongoing investigation and are carried out to establish the truth.¹⁰ Furthermore, the Prosecution argue that its right to a fair trial comprises the right to undertake re-interviews.¹¹ Additionally, the Prosecution note that other Trial Chambers have allowed the parties to carry out re-interviews.¹²

III. Relevant Provisions

4. Regulation 24(5) of the Regulations of the Court (“Regulations”) provides that:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.

5. Furthermore, Regulation 34(c) of the Regulations provides:

Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response.

IV. Leave to Reply should be Granted

6. It is well established in the jurisprudence of this Court that a Chamber may, as a matter of discretion, grant leave to reply when the moving party has shown “good cause”.¹³ Both Pre-Trial and Trial Chambers of the Court have deemed such good cause to exist when new and distinct issues of law and fact are raised in the response and where the importance and potential effect of the

⁸ ICC-02/05-03/09-140, para. 4.

⁹ ICC-02/05-03/09-140, para. 5.

¹⁰ ICC-02/05-03/09-140, paras. 5 and 6.

¹¹ ICC-02/05-03/09-140, para. 8.

¹² ICC-02/05-03/09-140, para. 8.

¹³ *Prosecutor v. Bemba*, PTC III, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294, para. 3: "Having considered the Application, the Single Judge is of the opinion that the Defence has shown good cause to grant leave to reply to the Prosecutor's Response."

issues contained in the original motion and response necessitate additional submissions being made.¹⁴

7. The Defence do not suggest that the Prosecution proceeded in an improper manner when responding to the Oral Application in compliance with the Chamber's Order of 21 April 2011. Rather, the Defence submit that the observations by the Prosecution in its Response address matters beyond the oral submissions made by the Defence and, in relation to witness proofing, fails to provide a full exposition of the relevant issues and law. This necessitates a Defence reply given the importance of the issues raised in the Oral Application and Response.
8. The Defence seek leave to address the following issues:
 - (a) The new legal issue raised in the Response of the Prosecution's right to continue investigations post-confirmation.¹⁵ The Defence did not make any observations on the right to investigate in the course of the Oral Application. Leave is warranted on this point alone given its importance and potential impact on the outcome of trial;
 - (b) The new legal issue raised in the Response of the circumstances under which re-interviews have taken place in other cases before the Court. This was not addressed in the Oral Application. The issue is significant because the comparison by the Prosecution of the circumstances in the present case with the circumstances under which re-interviews have taken place in other cases before the Court is incomplete;¹⁶

¹⁴ See e.g. *Prosecutor v. Mbarushimana*, PTC I, Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material", ICC-01/04-01/10-61, 24 February 2011; *Prosecutor v. Katanga & Ngudjolo*, TC II, Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the *Regulations of the Court*), 27 March 2009, ICC-01/04-01/07-1004-tENG.

¹⁵ ICC-02/05-03/09-140, para. 6-9.

¹⁶ ICC-02/05-03/09-140, para. 8. The Prosecution merely state that other Trial Chambers allowed the re-interviewing of witnesses. However, regarding the particular cases referred to in its Response, the Prosecution do not discuss the circumstances under which the re-interviews took place, for instance, whether the Prosecution sought the permission of the Chamber before undertaking re-interviews, whether the Prosecution explained to

(c) Further, the Defence submit that the significance of the issue and the Prosecution's incomplete analysis of it establishes good cause to permit the Defence to reply to the Prosecution's submissions on the definition of witness proofing.¹⁷ The Response highlights one aspect of the definition of witness proofing, at the expense of the remainder of the definition. Additionally, although the Defence referred to a decision in the *Lubanga* case at the start of the Oral Application¹⁸, at no stage did the Defence define witness proofing. As a result, the Defence have not had the opportunity to address the Prosecution's submissions on this issue. Accordingly, to avoid prejudice to the Defence, the Defence submit that there is good cause to permit a reply in order that the whole jurisprudence on the definition of witness proofing can be placed before the Chamber and a full consideration of this important issue undertaken.

9. It would be in the interests of justice to permit the Defence to file a reply. At the Status Conference, the Defence made a short oral application to which the Prosecution responded orally. The Trial Chamber later directed that the Prosecution submit its position on the matter and in particular on the issue of safeguards in writing. As detailed above, the Prosecution's Response went beyond the scope of the Oral Application by the Defence. As a result, the Defence have not had the opportunity to address either the new issues raised in the Response or the definition of witness proofing. Under these circumstances, the Defence should be allowed to address in a reply these matters, the correct interpretation of which have a significant impact on the rights of the accused and the Chamber's search for the truth.

the Chamber and Defence the reasons necessitating a re-interview, and whether any of the Trial Chambers imposed safeguards on authorised re-interviews.

¹⁷ ICC-02/05-03/09-140, para. 3-5.

¹⁸ See *supra* footnote 4.

Relief Requested

Based on the above submissions, the Defence respectfully request the Trial Chamber to grant it leave to reply to the Prosecution Response under Regulations 24(5) and 34(c) of the Regulations.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Defence Counsel for Abdallah Banda Abakaer Nourain and
Saleh Mohammed Jerbo Jamus

Dated this 10th Day of May 2011

At Nairobi, Kenya